

OGC Has Reviewed

Chief, Personnel Branch

15 March 1948

STATINTL Assistant General Counsel

1. Reference is made to your memorandum to this office, dated 9 March 1948, concerning the above subject. The form 57 and Special Orders No. 43, dated 20 February 1946, enclosed in your memorandum are returned herewith. You request advice whether subject may be employed by CIA as a Consultant at \$75.00 per day without making it necessary that he relinquish his retirement pay while so employed.

2. It is obvious that Section 58 of Title 5 of the USCA is not applicable since Section 59 of that Title specifically states that Section 58 shall not apply to retired officers of the Army. There is for consideration whether that subject would come within the terms of Section 62 of Title 5, USCA. However, Section 62 provides that retired officers of the Army who have been retired for injuries or incapacity incurred in line of duty shall not, within the meaning of Section 62, be construed to hold or to have held an office during such retirement. Upon reading the retirement orders of subject (Special Orders No. 43, dated 20 February 1946), we feel that Lang does not hold an office within the meaning of Section 62. There remains for consideration, Section 212 of the Economy Act, included in the USCA as Section 59a of Title 5, which reads as follows:

"59a. Same limitation of amount of retired pay as commissioned officer in the Army, Navy, Marine, Coast Guard, Coast and Geodetic Survey and Public Health Service. (a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government or the municipal government of the District of Columbia or under any corporation, the majority of the stock of which is owned by the United States, shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate or compensation from such civilian office or position, makes the total rate from both sources more than

\$3,000; and when the retired pay amounts to or exceeds the rate of \$3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

(b) This section shall not apply to any person whose retired pay, plus civilian pay, amounts to less than \$3,000: Provided, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States or for disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1 (a), part I, paragraph I. June 30, 1932, c. 314, #212, 47 Stat. 406, as amended July 15, 1940, c. 626, #3, 54 Stat. 761.

3. In 26 Comp. Gen. 501, dated 17 January 1947, it is stated that GAO has not had occasion to pass upon the question of whether an officer of the armed forces retired for disability, who is employed as a consultant upon a fee basis, holds a "civilian office or position", within the meaning of those words as used in section 212 of the Economy Act. The term "compensation" in its generally accepted meaning embraces both "fees" and "salary" as well as renumeration received in any other form for services rendered. The particular case cited is one in which the Veterans' Administration was involved, and the Comptroller stated:

"It would not appear the consultants the Veterans' Administration is desirous of employing in the instant matter will perform or supervise duties and responsibilities imposed by law upon the agency, or be under the administrative control of an official of the Government in the usual sense. On the contrary, it is understood that their employment will be in an advisory capacity".

The opinion goes on to state that their duties will consist primarily of expressing their views and giving their opinions and recommendations upon particular problems and questions presented to them for consideration in consultation or otherwise by administrative officers of the Government. Therefore, it is concluded in the opinion that employment by Veterans' Administration of former officers of the armed forces, retired for disability, as consultants upon a fee basis would not be in contravention of

Section 212 of the Economy Act -- no sound reason being perceived for regarding them as occupying an "office or position" within the meaning of those terms as used in said statute. The Veterans' Administration had specifically pointed out that the compensation of such consultants was based on a specific amount per visit as differentiated from a per annum, per diem, or other element basis.

4. In 26 Comp. Gen. 720, dated 31 March 1947, the Navy Department desired to employ a former Navy officer, retired for disability, by a personal service contract for employment. It was held that persons employed by contract to perform duties imposed by law upon an agency, and who are subject to control and supervision of administrative officers are employees holding positions under the United States Government. A naval officer retired for disability incident to the service but not in combat with the enemy, who is employed under a contract to perform purely personal services, is subject to the provisions of Section 212 of the Economy Act (5 USCA '59a).

5. Your memorandum of 9 March 1948 furnishes no indication of the proposed duties for [REDACTED]. Consequently, this office is not in a position to answer your specific question. There should be submitted a detailed explanation of the duties which would be performed by the subject. On receipt of such explanation, we shall be pleased to furnish you with our opinion whether or not it will be necessary that he elect to receive his retired pay or the proposed per diem of \$35.00 per day as compensation for his services.

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General Counsel:JSW:mes
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